

ST 01-29

Tax Type: Sales Tax

**Issue: Audit Methodologies and/or Other Computational Issues
Books and Records Insufficient**

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	Docket No. 01-ST-0000
v.)	IBT # 0000-0000
)	NTL # 00-00000000000000
ABC RESTAURANT)	
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Jim Day, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Edgar E. Lim, Attorney at Law, for ABC Restaurant.

Synopsis:

The Department of Revenue (“Department”) audited ABC Restaurant (“taxpayer”) for the period of January 1997 to June 2000. During the audit, the taxpayer did not provide the auditor with books and records, and the auditor estimated the amount of liability owed by the taxpayer. The Department issued a Notice of Tax Liability (“Notice”) to the taxpayer for the additional tax. The taxpayer timely protested the Notice. An evidentiary hearing was held during which the taxpayer argued that the auditor’s estimate was too high. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. The taxpayer operates a restaurant in Anywhere, Illinois, which is near an Air Force Base. (Tr. pp. 19, 21, 24)

2. The Department conducted an audit of the taxpayer for the period of January 1997 through June 2000. (Dept. Ex. #1)

3. The taxpayer did not have a complete set of books and records for the auditor to use to perform the audit. (Tr. p. 7)

4. Because the taxpayer did not have a complete set of records for the business, the auditor estimated the tax liability for the audit period. To do this, the auditor obtained the taxpayer's purchase records from its suppliers and applied a markup to those amounts. (Tr. pp. 7-8)

5. The auditor marked up the taxpayer's purchases by 100% and then reduced this amount by 10% to allow for waste and for family and friends who ate off the buffet for free. The auditor took the difference between this figure and the amount that the taxpayer reported on its returns to determine the amount of unreported sales. (Tr. pp. 9-11; Dept. Ex. #2).

6. The auditor multiplied the unreported taxable sales by 7% and multiplied the amount for waste and free food by 1% to determine the total amount of tax due. (Tr. pp. 11-13; Dept. Ex. #1, 2)

7. On December 12, 2000, the Department issued a Notice of Tax Liability to the taxpayer that shows additional tax due in the amount of \$17,170, plus interest and penalties. A copy of the Notice was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #1)

8. The taxpayer did not present any records from its business indicating that the Department's determination is incorrect.

CONCLUSIONS OF LAW:

The Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*) imposes a tax upon persons engaged in the business of selling at retail tangible personal property.

35 ILCS 120/2. Section 7 of the ROTA provides in part as follows:

“Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale, inventories prepared as of December 31 of each year or otherwise annually as has been the custom in the specific trade and other pertinent papers and documents. * * * All books and records and other papers and documents which are required by this Act to be kept shall be kept in the English language and shall, at all times during business hours of the day, be subject to inspection by the Department or its duly authorized agents and employees.” (35 ILCS 120/7)

Section 4 of the ROTA provides that the certified copy of the notice of tax liability issued by the Department "shall be prima facie proof of the correctness of the amount of tax due, as shown therein." 35 ILCS 120/4. Once the Department has established its *prima facie* case by submitting the notice into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. A.R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 832 (1st Dist. 1988). To prove its case, a taxpayer must present more than its testimony denying the accuracy of the Department's assessment. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, 217 (1st Dist. 1991). The taxpayer must present sufficient documentary evidence to support its claim. Id.

In the present case, the taxpayer did not keep books and records of its sales as required by section 7 of the ROTA. Without books and records, the auditor was

compelled to estimate the amount of the taxpayer's sales. To do this, the auditor obtained the amount of the taxpayer's purchases from its suppliers and marked up the purchases by 100%. Although the auditor admitted that he had not previously audited a Chinese buffet restaurant, he stated that he had recently audited another Chinese restaurant in the same area as the taxpayer, and that restaurant had used a markup that was greater than 100%. The auditor had also audited other restaurants that had used markups greater than 100%. (Tr. pp. 9-10) The auditor then reduced the estimated sales by 10% to allow for waste and free food in order to obtain a figure for the amount of taxable sales.

At the hearing, the taxpayer argued that the auditor's markup of 100% was too high. Mrs. Wei testified that for the buffet the markup is only 15 to 25% and for menu items it is 35%. (Tr. p. 20) She also testified that she travels to St. Louis to make purchases for the taxpayer and that when she makes these purchases she also buys for herself and her friends and employees. (Tr. p. 24) When she buys for friends and family, she does not pay tax on the purchases. (Tr. pp. 26-27) When she is reimbursed for these purchases, she does not deposit the reimbursement into the business account. (Tr. pp. 24-25) She said that approximately 10 to 20% of the purchases are for friends or personal use. (Tr. p. 25) She has no records to support this contention. (Tr. p. 27) She said she does not keep records of what she buys for family and friends because she does not know how to keep them. (Tr. pp. 30-31)

Although the taxpayer's claims may reduce the amount owed, it is incumbent upon the taxpayer to present documentary evidence to support its arguments. The only documentary evidence presented by the taxpayer were coupons that show that the taxpayer either provided a free meal after a certain number of meals were purchased or

provided a reduced-priced meal once a regular-priced meal was purchased. The auditor, however, already provided a 10% discount in his estimate to allow for free food, and the coupons do not show that the auditor's estimate was incorrect or inaccurate.

At the hearing, the taxpayer argued that it is innocent until proven guilty and the Department should have the burden of proving the amount owed. The taxpayer argued that the auditor did not attempt to obtain the taxpayer's bank records and made assumptions concerning the unreported sales without corroborating evidence. The taxpayer's arguments, however, are contrary to the ROTA and case law. As previously stated, the taxpayer must keep books and records of all of its sales (see 35 ILCS 120/7), and without these records the Department must make its determination according to its best judgment and information. (35 ILCS 120/4) The taxpayer has the burden of overcoming the Department's determination by providing more than its own testimony denying the assessment. Mel-Park Drugs at 217. In order to show that the auditor's markup was excessive for a buffet restaurant, the taxpayer must present documentary evidence that supports this contention. The taxpayer has failed to present that evidence, which requires upholding the Department's determination.

In addition, the taxpayer must keep accurate records concerning its purchases and not co-mingle its purchases with those of friends and family. If purchases are made for personal use, the tax must be paid, and those purchases must be made separate from the business purchases. XXXXX and her friends must not continue to circumvent the law by making personal purchases tax-free, presumably by using a resale certificate to make the purchases.

Recommendation:

For the foregoing reasons, it is recommended that the Notice of Tax Liability be upheld.

Linda Olivero
Administrative Law Judge

Enter: November 15, 2001